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MICHAEL RODAK, JR., CLE

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 5566

MARIE C. EGBERT MARTINEZ, Respondent,

v.

UNITED STATES OF AMERICA, Respondent, and

ELSIE E. EGBERT, Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT MARIE C. EGBERT MARTINEZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Richard S. Morris
Montgomery, Federici, Andrews, Hannahs & Morris
P. O. Box 2307
Santa Fe, N.M. 87501
Attorneys for Respondent Marie C. Egbert Martinez

November 8, 1972

PETITION NOT PRINTED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 5166

MARIE C. EUGENE MARTINEZ, Respondent,

v.

UNITED STATES OF AMERICA, Respondent,
and

ELSIE K. NORRIS, Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE TENTH CIRCUIT

BRIEF OF RESPONDENT MARIE C. EUGENE MARTINEZ
IN OPPOSITION TO PETITION FOR
WRIT OF CERTIORARI

Richard S. Morris
Montgomery, Federick,
Andrews, Hannona &
Morris
P. O. Box 2307
Santa Fe, N.M. 87501
Attorneys for Respon-
dent Marie C. Eugene
Martinez

November 8, 1972

PETITION DOC. DENIED

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1972

No. 5566

MARIE C. EGBERT MARTINEZ, Respondent,

v.

UNITED STATES OF AMERICA, Respondent, and

ELSIE E. EGBERT, Petitioner.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

BRIEF OF RESPONDENT MARIE C. EGBERT MARTINEZ IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

QUESTION PRESENTED

Whether the deceased veteran (the son of the petitioner and the husband of the respondent Martinez) manifested the requisite intent, and took action in accordance with that intent, to change the beneficiary of a policy of National Service Life Insur-

ance from his mother (the original, pre-marriage beneficiary) to his wife.

STATEMENT

In the trial of this case to the District Court both parties presented evidence concerning (1) the intent of the deceased veteran with respect to who, as between the respondent and the petitioner, should be the beneficiary of the policy, (2) the belief of the decedent that he already had taken sufficient action to designate his wife, the respondent, as the beneficiary, and (3) the decedent's additional, affirmative acts to accomplish that intention. These facts were discussed in the Memorandum Opinion of the District Court (Petition, Appendix, p. 13) and the conflicting evidence was resolved in favor of the respondent, the Court stating:

> "The evidence shows that the insured not only intended to substitute his wife as beneficiary under the policy, but also that

he committed sufficient affirmative acts to manifest that intent.

* * *

"The Court finds that the insured intended to change the beneficiary on his policy from his mother to his wife and carried out sufficient affirmative acts in performance thereof so that his clear intent should be carried out." (Memorandum Opinion of District Court, pp. 3, 4; Petition, Appendix, pp. 15, 16).

The Court of Appeals affirmed the judgment of the District Court. (Petition, Appendix, page 17).

ARGUMENT

Both the District Court and the Court of Appeals recognized that the dispute between the parties was factual. Both Courts recognized the applicability of the general rule that the insured's intent must be manifested in his acts in order to accomplish a change of beneficiary, and both Courts recognized that the sufficiency of those acts must be determined upon the

facts of the particular case.

On the individual facts of this case, the District Court having accorded complete credibility to respondent's witnesses, there can be no serious question as to the correctness of the District Court's decision. There is no asserted conflict of decision between the Courts of Appeal, but only asserted differences in the results reached in various District Court cases which, by the very nature of the question, turn upon diverse factual situations. Manifestly, there is no important question of federal law requiring decision by this Court.

I.

THE DECISION OF THE DISTRICT COURT WAS CLEARLY CORRECT

The insurance policy involved in this case was issued to the decedent in 1947 at which time he designated his mother, the petitioner, as beneficiary. The decedent

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was married to the respondent in 1954 and remained so until his death in 1968.

After his marriage to the respondent the insured completed a record of emergency data form designating his wife, the respondent as beneficiary of unpaid pay and allowances, and believed that by such action he had effected a change in beneficiary of his insurance policy.

After learning of his terminal illness (leukemia), the insured consulted a V.F.W. service representative, told the representative of his intent and past action taken to change beneficiary, and completed and signed a proper change of beneficiary form, in the presence of the representative, designating the respondent as the beneficiary of the insurance policy. Although this form could not be located following the death of the insured, other disinterested witnesses confirmed that the insured had

told them he had been to the V.F.W. and had done everything necessary to designate the respondent as beneficiary of the subject policy, which was the only life insurance owned by the insured. These witnesses, including the V.F.W. service representative, were accorded complete credibility in the District Court's Memorandum Opinion. (Petition, Appendix, p. 16)

II.

THE DECISION OF THE COURT OF APPEALS WAS CLEARLY CORRECT

Both the District Court and the Court of Appeals recognized and applied the proper legal standard as announced in Wiley v. United States, 399 F.2d 844 (10th Cir. 1968), to wit (pp. 846-47):

> "This court has on many occasions considered the factors that are necessary in order to sustain a beneficiary change of this type. We have adopted the substantial compliance doctrine under which attempts by an insured to change

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> the beneficiary will be liberally construed if the intention to effectuate the change is complimented by an affirmative act reasonably tending to manifest such intent."

The Wiley case followed several prior decisions of the Court of Appeals for the Tenth Circuit, including Collins v. United States, 161 F.2d 64 (1947), cert. denied 331 U.S. 859, and Bradley v. United States, 143 F.2d 573 (1944), cert. denied 323 U.S. 793.

Recognizing that the proper legal standard had been applied by the District Court and that the dispute was factual, the Court of Appeals, upon consideration of the complete record, upheld the findings and affirmed the judgment of the District Court. In view of the nature of the dispute, the Court of Appeal's action granting Appellee's Motion to Affirm was entirely proper and appropriate. Chicago, Rock Island & Pac. Ry. Co. v. Devine, 239 U.S. 52.

III.

NO CONFLICT OF DECISION EXISTS

The cases involving change of beneficiary of National Service Life Insurance are collected in an annotation at 2 A.L.R. 2d 489 where it is recognized that under the general legal standard requiring evidence of intent coupled with affirmative action to accomplish that intent, the various decisions are based on the particular facts of the individual cases. Although the annotation attempts to classify the decisions into "strict" and "liberal" categories based upon the degree of affirmative action necessary to effect a change of beneficiary, it is recognized that the degree to which intent is clearly proven is the predominant factor, even in those decisions purporting to follow the "strict" rule. See, e.g., Hawkins v. Hawkins, 271 F.2d 870 (5th Cir. 1950).

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Petitioner has not cited any conflict of decision among the Courts of Appeal and whatever conflicts exist among the District Court decisions are more readily determined by factual analysis than by the application of differing legal standards.

IV.

THE PETITION DOES NOT PRESENT AN IMPORTANT QUESTION OF FEDERAL LAW

Although this case, and this type of case, is extremely important to the litigants, it does not present an important question of federal law in that each case must be decided on its individual facts under broad principles which already are well defined. It is neither necessary nor advisable for the Court to attempt further definition of these principles in this type of case.

CONCLUSION

Upon the foregoing, respondent submits

that the Petition for a Writ of Certiorari should be denied.

Respondent also submits that the Petition should be denied on the ground that it was not timely filed, the Court of Appeals having entered its order denying appellant's Petition for Rehearing on July 14, 1972, and the Petition herein having been filed on October 13, 1972.

Respectfully submitted,

Richard S. Morris

Richard S. Morris
Montgomery, Federici, Andrews, Hannahs & Morris
Attorneys for Respondent Marie C. Egbert Martinez

November 8, 1972

CERTIFICATE OF MAILING

I hereby certify that a true and correct copy of the foregoing Brief was mailed to Owen M. Russell, Attorney for Petitioner, P. O. Box 1259, Raton, New Mexico 87740 on this 8th day of November, 1972.

Richard S. Morris

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